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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Petitioners,

v.

RUSSELL E. TRAIN, as Administrator, Environmental Protection Agency, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE FOR THE AMERICAN PETROLEUM INSTITUTE

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BRIEF AMICUS CURIAE FOR THE AMERICAN PETROLEUM INSTITUTE

INTEREST OF AMICUS CURIAE

Amicus Curiae American Petroleum Institute (hereinafter "API")[1] is a petitioner in *American Petroleum Institute, et al.* v. *EPA, et al.,* Consol. Nos. 74-1465, 74-1466, 74-1621 (10th Cir., argued March 24, 1976),[2] which challenges the Environmental Protec-

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[1] Petitioners in Nos. 75-978, 75-1473, and 75-1705 and the United States Solicitor General have consented to the filing of this amicus curiae brief by letters submitted to the Clerk of the Court pursuant to Rule 42(2).

[2] The API member companies which are named petitioners in American Petroleum Institute v. EPA, *supra,* include Continental

tion Agency's "effluent limitations guidelines" and standards of performance for existing and new petroleum refineries under the Federal Water Pollution Control Act Amendments of 1972 ("the Act"). API was also an appellant in *American Petroleum Institute* v. *Train,* 526 F.2d 1343 (10th Cir. 1975), which upheld court of appeals' jurisdiction to review EPA's "effluent limitations guidelines" for existing petroleum refineries.

API has maintained before EPA and the Tenth Circuit, as well as before other circuits as amicus curiae,[3] that EPA is required by Section 304(b) of the Act[4] to issue, not rigid, single-number existing plant standards, but rather flexible "guidelines" for tailoring and finalizing individual plant effluent limitations in the Section 402 State/federal permit pro-

Oil Company; Exxon Corporation; Gulf Oil Corporation; Phillips Petroleum Company; Shell Oil Company; Standard Oil Company of California; Standard Oil Company (Ohio); Sun Oil Company of Pennsylvania; Texaco, Inc.; and Union Oil Company of California.

[3] API has previously participated as amicus curiae before the courts of appeals in CPC International, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975) (*"CPC Int'l"*); American Meat Institute v. EPA, 526 F.2d 442 (7th Cir. 1975) (*"AMI"*); E. I. du Pont de Nemours & Co. v. Train, 8 ERC 1718 (4th Cir. 1976) (*"du Pont II"*); Hooker Chemicals & Plastics Corp. v. Train, 8 ERC 1961 (2d Cir. 1976) (*"Hooker"*); American Frozen Food Institute v. Train, 8 ERC 1993 (D.C. Cir. 1976) (*"AFFI"*).

[4] Parallel United States Code citations for the sections of the Act most frequently cited in this brief are:

Section 101—33 U.S.C. § 1251
Section 301—33 U.S.C. § 1311
Section 304—33 U.S.C. § 1314
Section 306—33 U.S.C. § 1316
Section 402—33 U.S.C. § 1342

gram. In view of the substantial impact which the outcome of this case may have on API's pending Tenth Circuit petition for review,[5] API respectfully requests the Court's consideration of the arguments and authorities presented in this amicus curiae brief.

Since API accepts court of appeals' jurisdiction and does not contest the Fourth Circuit's decision in *E. I. du Pont de Nemours & Co.* v. *Train,* 528 F.2d 1136 (4th Cir. 1975), *cert. granted,* No. 75-978, 44 U.S.L.W. 3585 (April 19, 1976) (*"du Pont I"*), this amicus curiae brief has been filed in Nos. 75-1473 and 75-1705 rather than in 75-978. However, insofar as the arguments and authorities presented herein are relevant to No. 75-978, API respectfully requests that they be considered in that docket also.

SUMMARY OF ARGUMENT

This case raises fundamental questions regarding the appropriate role of the States and the need for discretion by State officials to accommodate the enormously varied circumstances of thousands of existing industrial plants required to obtain permits under the Act's State/federal replacement of the previous federal Refuse Act permit program.

In the 1972 Amendments, EPA sponsored and Congress codified the Agency's own program of flexible technology guidelines developed administratively under the Refuse Act permit program. As an alternative to the previous system of water quality permits, the 1972 Amendments intended an "orderly transfer of

[5] Over and above legal issues common with this proceeding, API's pending Tenth Circuit petition challenges EPA's existing refinery "effluent limitations guidelines" and new refinery standards of performance on numerous additional legal, scientific and technical grounds.

permit authority" to the States through flexible "Federal guidance" in the form of detailed information affording State permit authorities carefully circumscribed discretion to tailor effluent limitations to the circumstances of individual plants.

Although EPA followed this pragmatic statutory approach for nearly a year, the Agency elected in late 1973 to usurp all but a nominal role for the States, ostensibly because the States might prove too "lax" in formulating permits taking account of the diverse, local circumstances of individual existing plants. Specifically, the Agency developed so-called "effluent limitations guidelines" for existing plants in inorganic chemicals and dozens of other industries which provided single-number discharge standards to be "mechanically cranked" by the States into individual discharge permits.

As detailed in this amicus curiae brief, EPA's abandonment of flexible "Federal guidance" to the States and subsequent issuance of rigid existing plant standards is fundamentally at odds with the overall statutory plan. For whatever imprecision may exist in other provisions of the Act, the text of Section 304(b) is explicit as to how Congress intended to regulate pollution from existing sources.

Specifically, Congress prescribed in Section 304(b) that EPA "*shall*" promulgate "*guidelines for* effluent limitations" within one year so that this "Federal guidance" could be utilized by the States in finalizing effluent limitations for individual existing plants.[6] In these guidelines, Congress mandated that EPA "*identify* . . . the *degree* of effluent reduction attainable" and

[6] All emphasis added throughout this amicus curiae brief unless otherwise indicated.

"*specify factors to be taken into account* in determining the control measures . . . to be applicable *to point sources.*" Nowhere did Congress authorize or even mention single-number standards in Section 304(b), a fact that is critically significant in light of the express provision elsewhere for national, independently enforceable new source "standards of performance" (Section 306), "toxic effluent standards" (Section 307(a)), and "pretreatment standards" (Section 307(b)).

Over and above the specific text of Section 304(b), which is confirmed by a coordinated reading of Sections 306, 307 and other provisions of the Act, the legislative history also strongly supports Congress' intent that EPA issue flexible guidelines rather than rigid standards for existing plants. Thus, both the Senate and Conference Committee Reports reaffirm Congress' contemplation that the Section 304(b) "guidelines for effluent limitations" identify a "*range*" of feasible discharge levels and "*specify factors*" for use by the States in tailoring individual plant permits to prevailing local circumstances.

Even more significant, EPA's existing plant standards, which must be "mechanically cranked" into individual permits, contradict the "primary pollution control responsibilities" reserved by Congress for the States. Indeed, Congress deliberately rejected the "inflexible[,] Washington dictated approach" adopted by EPA because such federal "usurpation" would "destroy the initiative of the States and local governments" and prove "wasteful and non-productive" in the long run.

Nor can EPA's rigid national standards be justified as a misguided attempt to achieve "uniformity" among existing plants. On the contrary, Congress recognized

that genuine "uniformity" could be achieved only by treating diverse sources differently and by avoiding procrustean standards which ignore widely varying individual plant circumstances. Indeed, it was precisely to guarantee such "uniformity" that Congress rejected rigid existing plant standards and opted instead for an EPA veto over individual plant permits under Section 402(d) of the Act.

Nothing in EPA's so-called "variance" provision changes this result. Hence, because EPA purports to have considered even plant-specific factors in its "effluent limitations guidelines," EPA's "variance" clause, which applies only in the case of "fundamentally different factors," has proved to be a practical nullity.

In fact, precisely because EPA's so-called "variance" clause provides far less flexibility than Congress intended, it is imperative that this Court promptly disapprove EPA's single-number discharge standards and invalidate the Agency's so-called "variance" provision. For otherwise, the many hundreds of plants still without permits are unlikely to resolve pending administrative proceedings equitably, and ultimately will have no choice but to seek judicial review of their individual permits in the federal courts of appeals under Secton 509(b) of the Act.

STATEMENT OF THE CASE

A history of the specific development of EPA's "effluent limitations guidelines" for the inorganic chemicals industry has been detailed by petitioners. *See* Petitioners' Brief in No. 75-978 at 13-22 (hereinafter "Pet. Br."). For purposes of this amicus curiae brief, all that is necessary is a chronological description, tracing the evolution of EPA's control efforts from the flexible technology "guidelines" and predominant

State role originally favored by EPA and codified by Congress in the 1972 Amendments to the rigid, single-number existing plant standards ultimately promulgated by EPA for mechanical application by State permit-issuing authorities in individual plant permits.

1. EPA's Experience with Technology Guidelines Under the Refuse Act Permit Program

Shortly after its formation in 1970, EPA was given responsibility for making water quality determinations in discharge permits issued pursuant to Section 13 of the Refuse Act of 1899, 33 U.S.C. § 407. *See* 36 Fed. Reg. 6564, 6566 (1971). Although EPA recognized that individual plant discharge limits would depend ultimately on the receiving stream water quality, EPA decided that its responsibilities under the Refuse Act permit program could best be carried out by establishing sets of technology "guidelines" for each major industry. The purpose of these technology "guidelines" was to provide a reference for the development of individual plant permits in the permit-issuing process.

From the outset, EPA recognized that such "guidelines" could serve only as a general benchmark for individual plant permits because of the enormous diversity and complexity within the broad industry categories to be regulated. Indeed, the disparate features of individual plants, including varying manufacturing processes, age, size, complexity, wastewater characteristics, location, climate, and other factors, precluded EPA from reducing industry discharge limits to a "simple formula computation."

EPA's view that no set of single-number discharge standards could substitute for the "careful exercise of

professional judgment" in developing individual plant permits was concisely summarized in Congressional testimony by John R. Quarles, Jr., then EPA Assistant Administrator for Enforcement and General Counsel:

> "The complexities of such determinations, together with the *infinite variations from case to case,* indicate that the establishment of effluent specifications *cannot be reduced to simple formula computation.*
>
> * * *
>
> "The effluent computation formulas which will be furnished to [permit authorities], when available, may be used to *supplement existing techniques for establishment of effluent specifications.* They will provide a quick method to determine whether proposed specifications are within a normal *range* but will not reduce the need for *careful exercise of professional judgment.*"[7]

More than anything else, it was this Refuse Act permit program experience which prompted EPA to support flexible "Federal guidance" rather than rigid, across-the-board existing plant standards when Congress in 1972 turned to consideration of amendments to the Federal Water Pollution Control Act.

2. EPA's Support and Acceptance of "Federal Guidance" During and After Passage of the 1972 Amendments

As detailed during their consideration by Congress, the 1972 Amendments were designed to effect two principal modifications in the Federal Water Pollution Control Act.

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[7] Memorandum, John R. Quarles, Jr., Assistant Administrator for Enforcement and General Counsel, July 1, 1971, *Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 92d Cong., 1st Sess. 1834-35 (1971).

First, the new legislation proposed "a major change in the enforcement mechanism of the federal water pollution control program from water quality standards to effluent limits."[8] This change was to be accomplished by adopting and codifying the approach of flexible technology "guidelines" established administratively by EPA under the Refuse Act permit program.

Second, Congress intended to accomplish an "orderly transfer of permit authority from the Environmental Protection Agency to the States" as "rapidly as they develop approved programs." 1 Leg. Hist. 363, 2 Leg. Hist. 1305. This "transfer of permit authority" "to the States" reflected Congress' recognition that "[i]t is impossible for the Federal Government to succeed in this program without the close and active cooperation of the States." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 125 (1972), 1 Leg. Hist. 812. Indeed, without "meaningful local and State participation," rather than "a Federal dictatorship," Congress envisioned that "the program will founder on the rocks of the generally inflexible[,] Washington dictated approach." 1 Leg. Hist. 355.

Consequently, EPA consistently supported legislation calling for the issuance of "Federal guidance" to State permit authorities for setting individual plant effluent limitations in the permit-issuing process. As explained by then EPA Administrator Ruckelshaus to the Senate Air and Water Pollution Subcommittee,

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[8] *See* S. Rep. No. 92-414, 92d Cong., 1st Sess. 7 (1971), 2 Leg. Hist. 1425; EPA v. California *ex. rel.* State Water Resources Control Bd., 44 U.S.L.W. 4781, 4782 (June 7, 1976).

Citations to "Leg. Hist." refer to the two-volume Committee Print entitled "A Legislative History of the Water Pollution Control Act Amendments of 1972," 93d Cong., 1st Sess. (1973).

> "[w]e believe that such *Federal guidance* is especially important in the area of effluent limitations. This concept is new in the law. It would be difficult and needlessly *duplicative* for each State to gather all the scientific, *industrial,* and *technological information* upon which effluent limitations must be based. *Federal leadership* must be provided here *so that the States, in setting effluent limitations,* have a clear idea of the task."[9]

Accordingly, at EPA's urging, Congress adopted amendments to the Act which expressly require EPA to promulgate "regulations providing *guidelines for* effluent limitations." As interpreted by Administrator Ruckelshaus after the passage of the Act, these guidelines incorporated the flexible "Federal guidance" favored by EPA:

> "*[E]very plant involves individual factors which differentiate it from others* and directly affect what would be the best practicable control technology *for that plant. EPA's guidelines* will provide the most comprehensive effort ever made on a national basis to *provide information* with respect to industrial waste control technology. However, to do the job on *specific plants* will take the full-time efforts of hundreds of *Federal and State* pollution control people, working as a team . . . . The EPA guidelines . . . *will not be the final answer to pollution control questions.*"[10]

Implicit in this flexible "guidelines" approach was Congress' recognition that EPA could not possibly establish equitable, single-number discharge standards

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[9] *Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 92d Cong., 1st Sess. 19 (1971).

[10] *Remarks of Administrator Ruckelshaus,* Annual Meeting of Pollution Control Federation (October 11, 1972), *reprinted in* 45 J. WATER POLLUT. CONTROL FED. 1, 2 (1973).

for mechanical application to all *existing* plants in a given industry. EPA's then Assistant Administrator for Enforcement Quarles, the official with principal responsibility for administering the permit program, explained this point as follows:

> "The key to most of the puzzles concerning the policies we will follow in this area is that specific determinations as to application of best practicable control technology currently available can only be made on a plant-by-plant basis. *There is no way that anyone can sit in Washington and prepare a document that will specify effluent limitations that should be attained at numerous plants across the country.*"[11]

Following passage of the Act, EPA immediately began to apply administratively the flexible "Federal guidance" approach mandated by Congress. Early in 1973, EPA promulgated interim "Guidance" documents which set forth a range of feasible discharge levels and specified variable factors for each industry to assist in establishing individual plant permit conditions under the new State/federal permit program.[12]

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[11] Address of John R. Quarles, Jr., to an EPA-Manufacturing Chemists Association Symposium, September 13, 1972. Deputy Administrator Quarles' remarks echo Administrator Ruckelshaus' comparable admission "that there is no way anyone in Washington can properly prepare a document that specifies the effluent limitations for all the tens of thousands of plants across the country." 45 J. WATER POLLUT. CONTROL FED. 1, 2 (1973).

[12] The "Petroleum Refining Guidance" document expressly acknowledged that circumstances "will vary widely among individual refineries," and, accordingly, identified a range of feasible discharge levels as well as a host of specific "factors" (*e.g.,* "availability of land," "types of crude oils," "refinery age," "climate and geographic location") to guide the exercise of professional judgment by the permit-issuing authorities. *See also* Pet. Br. 14-15.

Simultaneously, EPA set about the task of updating and improving its guidance to permit authorities in light of the requirements of the 1972 Amendments. In this connection, EPA published Requests for Proposal for all major industrial categories, soliciting bids from engineering contractors for studies which would "identify the *range* of control and treatment technology within each industrial category and subcategory." *See* Pet. Br. 14. Like EPA's "Guidance" documents, these Requests for Proposal reflected EPA's recognition of the hazards of a "generally inflexible[,] Washington-dictated approach" as well as the impossibility of preparing "a document that will *specify* the effluent limitations that should be attained at numerous plants across the country." *See* pp. 7-11, *supra*.

Specifically, EPA acknowledged that the Act contemplates "a *range* of technology," and that "*effluent limitations* consistent with the application of such technology *will* also *vary*." Accordingly, EPA directed potential contractors to "[l]ist the *factors* which should be taken into account in determining Level I and Level II control technology for *particular plants* and consequently in determining *permissible effluent levels for such plants*." *See also* Pet. Br. 14.

If EPA had continued to follow the flexible "Federal guidance" approach adopted by Congress and largely reflected in EPA's own Guidance documents and Requests for Proposal, many of the difficulties giving rise to the avalanche of more than two hundred lawsuits challenging EPA's implementation of the 1972 Amendments might never have occurred. Notwithstanding this early, faithful implementation of Congress' intent, however, EPA decided late in 1973 to

abandon the statutory "guidelines" approach, and instead to promulgate rigid, single-number discharge standards to be "cranked mechanically" by the States into individual plant permits.

3. EPA's Expedient Abandonment of the Statutory Guidelines and Promulgation of Rigid Discharge Standards Which Revoke the States' Primary Role Under the Permit Program

The full story behind EPA's decision to discard Congress' flexible technology guidelines and to opt instead for rigid, single-number discharge standards may never be known. *See* Pet. Br. 15-22. However, this much is clear—EPA acted not on the basis of what was realistic for widely disparate existing facilities or sound from a technical standpoint, but on the basis of short-run expediency in the face of litigation by environmental groups designed to repeal "meaningful local and state participation" and to resurrect the "Federal dictatorship" approach rejected by Congress. *See* pp. 8-13, *supra*.

In particular, the Natural Resources Defense Council ("NRDC") threatened to file suit in April 1973 if EPA did not publish guidelines for industrial categories by October 1973 and issue permits for all point sources by December 31, 1974. Although these deadlines were completely unrealistic for EPA to do an adequate professional job of promulgating meaningful guidelines and issuing permits, NRDC nonetheless filed suit in August 1973 against EPA in the United States District Court for the District of Columbia.

Three months later, without apparent perception of the far-reaching consequences for EPA and the many affected industries, the district court entered an order compelling EPA to publish industry-by-industry regu-

lations at approximately one-week intervals extending from January 15, 1974 through November 29, 1974.[13] This timetable proved unachievable and, even now, EPA has not issued regulations for all the industries specified by the district court. *See* Pet. Br. 17 n.25.

Under these circumstances, the district court's order became an excuse for EPA to disregard the Act and repeal the States' prescribed "primary" role in the permit program. Hence, confronted with unworkable deadlines for the promulgation of guidelines and issuance of permits, EPA short-circuited the statutory guidelines by issuance of binding, single-number discharge standards, ostensibly because EPA believed the States would be too "lax" in formulating permits taking account of the diverse, local circumstances of individual existing plants. R. 6500-04; Pet. Br. 19.

The first hint of EPA's switch to rigid, existing plant standards was signalled in August 1973 when EPA coined the expression "effluent limitations guidelines," appearing nowhere in the Act, to describe the regulations which it planned to issue for existing sources. 38 Fed. Reg. 21202 (1973). Publication of proposed regulations for many industries later in 1973 revealed the purpose of EPA's expression "effluent limitations guidelines" used to describe its existing plant regulations—specifically, EPA intended to ignore the guidance step altogether and issue rigid *existing* plant standards identical in form and format to the *new* plant standards expressly called for in Section 306 of the Act.

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[13] Natural Resources Defense Council v. Train, 6 ERC 1033 (D.D.C. 1973), *rev'd in part and remanded*, 510 F.2d 692 (D.C. Cir. 1975).

As an afterthought, most likely to shore up its position in upcoming litigation challenging its so-called "effluent limitations guidelines," EPA included in its final regulations a previously unproposed "variance procedure," ostensibly designed to permit departure from EPA's 1977 "effluent limitations guidelines" for "certain plants" within each industrial category. However, because EPA purported to consider even plant-specific factors such as size, age, and manufacturing processes in developing its regulations, the "variance procedure," which applies only to factors "fundamentally different from the factors considered in the establishment of the guidelines," has little, if any, practical significance.

Consequently, EPA's "effluent limitations guidelines" violated the Agency's own basic maxim that "[t]here is *no way* anyone can sit in Washington" and set "effluent limitations that should be attained at numerous plants across the country." For stripped of the so-called "variance procedure" which has never actually provided individual plant flexibility, EPA's "effluent limitations guidelines" amount to rigid across-the-board standards which deprive State permit-issuing authorities of the plant-by-plant discretion intended by Congress in the 1972 Amendments.

This fundamental rigidity of EPA's "effluent limitations guidelines" has been consistently criticized by the scientific and technical community. For example, the Effluent Standards and Water Quality Information Advisory Committee ("ES&WQIAC"), which Congress chartered under Section 515 of the Act to "provide, assess and evaluate scientific and technical information" and to oversee EPA development of Section 304(b) guidelines, has repeatedly warned EPA against

procrustean standards that ignore the widely disparate circumstances of individual existing plants.

On this basis, ES&WQIAC condemned EPA's "effluent limitations guidelines" as *"arbitrarily established inflexible standards"* which give minimal consideration to *"great differences in individual facilities* among generic industries with regard to raw waste load, size of plant, age and type of process equipment now operating in a given plant, and climatic and geographic location factors."[14] Indeed, the statutory scientific committee two years ago foresaw that "[m]ost effluent limitations guidelines . . . *can be met only under certain controlled, perfect conditions* . . . ."[15]

Rather than straitjacket industry with "arbitrarily established inflexible standards," ES&WQIAC forcefully recommended that EPA return to the statutory "guidelines" approach. Thus, according to the statutory committee, "[r]ather than set *one number* as an effluent limitation to be met by all plants within an industry," technically sound guidelines promulgated by EPA "should establish a *range* of limits . . . "[16]

In short, as officially reviewed by ES&WQIAC, EPA's "effluent limitations guidelines" are "unscientific" since they disregard "great differences in individual facilities" which could have been accounted for had EPA promulgated "guidelines" establishing a "range of limits." As perceived by this authoritative

[14] BNA Environment Reporter, Current Developments, p. 855 (September 28, 1973).

[15] BNA Environment Reporter, Current Developments, p. 1481 (March 8, 1974).

[16] *Id.*

ES&WQIAC evaluation, the short-term administrative expediency which prompted EPA's decision to forego the issuance of legally valid guidelines will inevitably prove enormously wasteful and counterproductive to efficient and lasting pollution control progress.

ARGUMENT

I. SECTION 304(b) REQUIRES EPA TO ISSUE, *NOT* RIGID EXISTING PLANT *STANDARDS*, BUT RATHER FLEXIBLE *"GUIDELINES"* FOR TAILORING EFFLUENT LIMITATIONS TO THE CIRCUMSTANCES OF INDIVIDUAL PLANTS IN THE PERMIT-ISSUING PROCESS.

Seven courts of appeals have now rendered nine separate opinions dealing with EPA's construction and implementation of Sections 301(b) and 304(b) of the Act.[17] Three separate and distinct issues emerge from these several opinions: (i) which court or courts have jurisdiction to review EPA's existing plant regulations; (ii) whether EPA is authorized to issue effluent limitations by regulation under Section 301(b) of the Act; and (iii) what is the proper role and required format of the "guidelines for effluent limitations" mandated by Section 304(b) of the Act.

Although these distinct questions have unfortunately tended to merge in the various court opinions, only the last issue, namely the purpose and content of Section 304(b) "guidelines for effluent limitations," critically affects the degree of discretion afforded State and EPA permit-issuance authorities to provide flexibly for disparate existing plant circumstances in individual discharge permits.

[17] American Petroleum Institute v. Train, 526 F.2d 1343 (10th Cir. 1975) (*"API"*); American Iron & Steel Institute v. EPA, 526 F.2d 1027 (3d Cir. 1975) (*"AISI"*); Natural Resources Defense Council v. EPA, 8 ERC 1988 (2d Cir. 1976) (*"NRDC"*). *See also* cases cited at p. 2 n.2, *supra; du Pont I*, p.3, *supra.*

For example, the issue of court of appeals' jurisdiction to review EPA's regulations may be resolved independently of both EPA's purported authority to issue effluent limitations by regulation under Section 301 and the required content of "guidelines for effluent limitations" under Section 304(b). As the Tenth Circuit explained in *API, supra,* the "[e]xistence of jurisdiction must not be confused with the exercise of that jurisdiction," and, regardless of the "validity or invalidity" of the Administrator's action, jurisdiction here "is incident to a federal statute granting the right to an interested person within the circuit to file a petition in the court of appeals to review agency action." 526 F.2d at 1345. *Accord, du Pont I, supra,* 528 F.2d at 1141.[18]

[18] Amicus accepts the existence of court of appeals' jurisdiction under Section 509(b)(1)(E) on the theory that, whatever else they are, EPA's "effluent limitations guidelines" constitute an "action of the Administrator" in "approving or promulgating" effluent limitations implemented in individual plant permits. However, any ruling by this Court that review jurisdiction lies *exclusively* in the courts of appeals might nullify several actions pending in the district courts and impose hardships on industries forced to reinstitute review actions in the courts of appeals on the eve of the July 1, 1977 statutory deadline. *See* Grain Processing Corp. v. Train, 407 F. Supp. 96 (S.D. Iowa 1976), *appeal pending,* No. 76-1233 (8th Cir.); National Renderers Ass'n v. Train, No. 75-0-482 (D. Neb.); American Ass'n of Meat Processors v. Train, No. 75-0-394 (D. Neb.); National Independent Meat Packers Ass'n v. EPA, No. 75-0-369 (D. Neb.).

Accordingly, this Court might hold such suits to have been properly instituted in the district courts if they allege actions "in excess of [EPA's] delegated powers and contrary to a specific prohibition in the Act." Leedom v. Kyne, 358 U.S. 184, 189 (1958). *See* H.R. REP. No. 92-211, 92d Cong., 2d Sess. 136 (1972), 1 Leg. Hist. 823 ("[T]he inclusion of section 509 is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law."). Similarly, the Court might validate jurisdiction over petitions initially instituted in the courts of appeals as pendent to actions to review EPA's new source standards of performance. *See* Pet. Br. 94-96.

Alternatively, the Court might restrict to *prospective* application only any ruling that review jurisdiction lies exclusively in either the courts of appeals or district courts. *See, e.g.,* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971); Allen v. State Bd. of Elections, 393 U.S. 544, 571-72 (1969) ("prospective effect" only given to jurisdictional ruling where "questions involve complex issues of first impression—issues subject to rational disagreement"); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422-23 (1964) (applying ruling prospectively after finding petitioners' submission of case to wrong court not an "unreasonable" misinterpretation of earlier Court decisions).

Likewise, the role of Section 304(b) "guidelines for effluent limitations" in the permit program is not resolved even if EPA were authorized to issue effluent limitations by regulation. For as held by the Third Circuit in *AISI, supra,* even if Section 301(b) empowers EPA to issue effluent limitations as a "ceiling" to the guidelines "range," this still would not dispense with the independent Section 304(b) requirement that EPA also issue "guidelines for effluent limitations" which provide "guidance to the permit-issuing authorities as to what factors to consider or how to set the particular discharge level within a feasible range . . . ." 526 F.2d at 1045-46.

Accordingly, this amicus curiae brief presents a coordinated reading of Sections 301, 304 and other provisions of the Act, which focuses on the central question of how Congress intended to accommodate the widely varying circumstances of individual existing plants under the Section 402 State/federal permit program. As we shall show, Congress contemplated that EPA would provide admittedly needed flexibility through the issuance of "guidelines for effluent limitations" which "identify" a "range" of feasible dis-

charge levels and "specify factors" for use by State and EPA permit-issuance authorities in tailoring permit conditions to the particular circumstances of individual existing plants.

A. In Contrast to Section 301(b), Which Does Not Authorize the Issuance of Any Regulations, Section 304(b) Expressly Requires EPA Promulgation of "Regulations, Providing Guidelines for Effluent Limitations" Which "Identify" the "Degree of Effluent Reduction Attainable" and "Specify Factors to Be Taken into Account" in the Permit-Issuing Process.

From the beginning, EPA has justified its issuance of so-called "effluent limitations guidelines" on a purported authority to issue nationwide effluent limitations under Section 301(b) of the Act. Although the courts have strained to find such authority in Section 301(b), they have invariably been forced to rely upon the Administrator's Section 501(a) power "to prescribe such regulations as are necessary to carry out his functions under this Act." *See, e.g., AISI, supra,* 526 F.2d at 1039; *AMI, supra,* 526 F.2d at 449; *du Pont II, supra,* 8 ERC at 1721.

But reliance on Section 501(a) begs rather than answers the threshold question of whether EPA issuance of single-number existing plant standards is even consistent with, much less "necessary" for the Administrator "to carry out his functions under this Act." The scope of EPA's role in this area depends upon Section 304(b), which spells out, rather than leaves to implication, the Administrator's "functions" in controlling existing source pollution. As we shall show, this provision contemplates, not across-the-board standards, but "guidance" to the States by regulations identifying a "range" of feasible discharge levels and

"specifying factors" to be taken into account by permit-issuance authorities in formulating individual plant effluent limitations.

The place to begin any statutory interpretation is with the text of the Act. The simple fact is that "[n]othing is said in § 301 about regulations." *du Pont II, supra,* 8 ERC at 1721. Rather, Section 301(b) merely "sets up specified goals for July 1, 1977 and July 1, 1983" to be "achieved" through "limitations" which "require application of the control technology established by the Administrator under § 304." *API, supra,* 526 F.2d at 1345.

Irrespective of any supplemental regulatory authority under Section 501(a), the EPA "Administrator not only has the power, but the *explicit obligation* to promulgate 'guidelines' under Section 304." *AISI, supra,* 526 F.2d at 1042. Even a cursory reading of the requirements of Section 304(b) shows that Congress intended EPA to issue regulations providing for more detailed guidance, and affording far greater discretion for State and EPA permit-issuance authorities, than provided by the single-number "effluent limitations guidelines" actually promulgated by EPA.

As captioned in the official version of the 1972 Amendments, the whole purpose of Section 304 is to provide "*information and guidelines*" so that State and federal officials can carry out their responsibilities under the Act. 1 Leg. Hist. 37.[19] Consistent with this

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[19] Throughout Congressional consideration of the 1972 Amendments, EPA consistently viewed and referred to Section 304 as restricted to "information requirements." *See, e.g.,* Letter of Administrator Ruckelshaus to John A. Blatnik, Chairman, Committee on Public Works, dated December 13, 1971, 1 Leg. Hist. 845.

objective, Section 304(b) specifies "guidelines for effluent limitations" with the obvious intent that such "guidelines" were not themselves "limitations" but were for the purpose of setting effluent limitations. And plainly such guidelines are for the permit-issuing authorities, not EPA, since it is "clearly an illogical interpretation" for EPA to argue that "the Administrator is required to promulgate guidelines for broad categories or classes which are to guide *himself* in setting precise limitations for specific point sources." *AISI, supra,* 526 F.2d at 1042 (emphasis in original).

This is amply demonstrated by the text of Sections 304(b)(1)(A) and (B) of the Act which provides that "guidelines for effluent limitations" shall:

> "*identify*, in terms of *amounts* of constituents and chemical, physical, and biological *characteristics* of pollutants, the *degree* of effluent reduction attainable . . . for classes and categories of *point sources* . . . ."

Notwithstanding criticisms of the Act as a "poorly drafted and astonishingly imprecise statute," *du Pont II, supra,* 8 ERC at 1721, Congress was careful in this provision to employ terms emphasizing flexibility so that EPA would set a *range* of feasible discharge levels. Therefore, the statute requires EPA *not* to *set* a *specific* discharge *number,* but to *identify* or categorize the *degree* or *scope* of effluent reduction attainable. Congress underscored that a *range* of discharge *levels* would be identified by use of the plural term "*amounts,*" and by calling for descriptive information regarding the "chemical, physical and biological characteristics of pollutants." *See Grain Processing, supra,* 407 F. Supp. at 103-04.

Any doubt that these terms indicate Congress' desire that EPA promulgate a "range" of feasible discharge levels rather than inflexible single-number limits is removed by the remaining text of Section 304(b). Thus, Congress in the second sentence of Sections 304(b)(1)(B) and (b)(2)(B) required EPA to consider a host of general factors on an industry-wide basis when identifying the range of discharge levels feasible for each industry category and subcategory.

The balance of the text in those sections proves that Congress intended much more than mere industry-wide consideration of factors in developing "guidelines for effluent limitations." For Congress recognized that the most important factors (including plant age, processes, process engineering problems and the like) would differ from industry to industry, and also from plant to plant within each industrial category.

To account for this variation, the first sentence of Section 304(b)(1)(B) provides that "guidelines for effluent limitations" "*shall*":

> "*specify factors to be taken into account* in determining the control measures . . . to be applicable *to point sources* . . . within such categories or classes."

A virtually identical provision is contained in Section 304(b)(2)(B) relating to "guidelines for effluent limitations" to achieve the Act's 1983 goal.

As held by the Third Circuit in *AISI,* this provision in Sections 304(b)(1)(B) and (b)(2)(B) "clearly contemplates that the guidelines promulgated by the Administrator . . . are to provide *guidance* to those authorities (presumably, the permit grantors) which determine the *precise degree* of effluent control required

of any *individual* point source." 526 F.2d at 1042. *Accord, Grain Processing, supra,* 407 F. Supp. at 104.

Hence, Congress expressly mandated that EPA "*shall*" "*specify* factors" which would be most important for each industry, and purposely employed the future tense, "*to be taken into account*," as a means of emphasizing that such factors were for *future* use by permit authorities in establishing precise effluent limitations for discrete "*point sources*" within the industrial category. In the Third Circuit's words, this provision can only be construed as meaning that "consideration of the enumerated factors was to be made by the permit grantors on a plant-by-plant basis." *AISI, supra,* 526 F.2d at 1043.

In short, the express statutory requirement that EPA "*specify factors*" in the "guidelines" reaffirms both Congress' direction that EPA identify a "*range*" of levels (for otherwise it would make little sense to "specify factors"), and Congress' prohibition of rigid standards for existing plants (which would likewise make specification of "factors" redundant). By the coordinate requirements that EPA identify a "range" of feasible levels and "specify factors" to be considered by permit authorities in selecting individual plant effluent limitations from the "range," Congress thus provided a workable middle ground between *de novo* development of individual plant effluent limitations on one hand, and unbending, procrustean national standards on the other.

B. Over and Above the Specific Text of Section 304(b), the Entire Statutory Scheme Deliberately Distinguishes Between *New* Sources, Which Are Subject to "Across-the-Board" National *Standards*, and *Existing* Sources, Which Are to Be Controlled by *Guidelines* for Use in the State/Federal Permit Program.

Apart from the specific text of Section 304(b) detailed above, an overall reading of Title III of the Act reaffirms Congress' intention that EPA regulate existing plants, not by across-the-board national standards, but much more flexibly through the issuance of guidelines for finalizing effluent limitations in the permit-issuing process.

First, Congress' omission of *any* authority to issue nationwide standards for existing sources plainly "was not *oversight,* for Congress provided unambiguously for the promulgation of national standards in other sections of the Act." *CPC Int'l, supra,* 515 F.2d at 1038. Specifically, as the Eighth Circuit explained in *CPC Int'l,* "[n]ationally promulgated standards were expressly mandated for new sources in § 306(b)(1)(B), for toxic discharges in § 307(a)(2), and for pretreatment standards in § 307(b) and (c)." *Id.* (footnote omitted).

Moreover, the statutory text of each of these provisions demonstrates that Congress consistently used the term "*standards*" when it intended EPA to promulgate fixed, *across-the-board restrictions by regulation.* Thus, Congress did four things in providing for *national* standards in these areas:

> "(1) it used the term "*standards,*" a word which takes on a special meaning because of its use under the Act; (2) it expressly provided that the *standards* were to be *published by regulation;* (3) it put *deadlines* on the process, *requiring that the Ad-*

ministrator publish the standards within a fixed period of time; and (4) it provided that *standards* were to be *enforceable independently of the permit system. See* § 306(e); § 307(d)." *Id.*

Since *none* of these elements exists in the regulatory scheme established by Congress for *existing* sources, EPA's promulgation of rigid, across-the-board standards under the guise of so-called "effluent limitations guidelines" is *prima facie* unlawful and in violation of the overall Congressional plan.

The fundamental illegality of EPA's use of the *same* regulatory format for both *new* and *existing* plants is confirmed by a closer review of the separate and contrasting statutory provisions for *new* and *existing* sources.[20] For *new* sources, Section 306(b) explicitly mandates the issuance of fixed "standards of performance" by "regulations" designed to be "national" in scope. By contrast, Section 301 *never once* mentions *standards,* much less the issuance of standards by regulations subject to a statutory deadline and made en-

[20] EPA has yet to reconcile the express provision for nationwide standards by regulation in Sections 306, 307(a), (b) and (c) with the conspicuous omission of *any* authority for the issuance of regulations under Section 301. The Seventh Circuit in the *AMI* case would paper over this gaping hole in EPA's position by suggesting that "Section 316(b)'s reference to '[a]ny *standard* established pursuant to section 301' tends to undermine" the Eighth Circuit's analysis in *CPC Int'l. See AMI, supra,* 526 F.2d at 450 n.17.

But use of the expression "standard" in Section 316 is easily reconciled by reference to Section 301(b)(1)(A)(ii), which provides for the achievement by 1977 of "applicable pretreatment requirements and any other requirement under section 307." *See also* Section 301(b)(2)(A)(ii). Established pursuant to this provision of Section 301, of course, are the pretreatment *standards* of Sections 307(b) and (c), thereby explaining the mention of *"standard"* in Section 316(b).

forceable independently of the permit program. *Compare* Section 306(e).[21]

Congress' use of the term "standards" to designate across-the-board regulations applicable nationwide is confirmed by the legislative history which shows that Section 306 "standards shall be applicable to *any new source* regardless of where it is constructed," and that "the Administrator must set the *standard* at a *particular* volume of effluent or a *particular* percentage of effluent reduction."[22] This explicit requirement of binding, nationwide *standards* for *new* sources contrasts with the Section 301 references to "effluent limitation," defined by the Act to include "schedules of compliance" which, by their nature, can be established *only* in the context of an individual discharge permit. *See* Section 502(11).[23]

[21] Significantly, Congress used the term *"standards"* no fewer than *nineteen* times in Section 306, relating to *new* plants, but *never once* mentioned *"standards"* in either Section 301 or 304, applicable to *existing* plants.

[22] H.R. REP. No. 92-911, 92d Cong., 2d Sess. 110 (1972), 1 Leg. Hist. 797; S. REP. No. 92-414, 92d Cong., 1st Sess. 59 (1971), 2 Leg. Hist. 1477. Comparable legislative history demonstrates that other statutory provisions calling for the issuance of standards similarly contemplate the issuance of across-the-board nationwide restrictions by regulation. *See, e.g.,* Section 307(a) ("toxic effluent standards"); H.R. REP. No. 92-911, 92d Cong., 2d Sess. 159 (1972), 1 Leg. Hist. 846 (referring to "*Federal* effluent standards and prohibitions for toxic substances"); Section 307(b) ("pretreatment standards"); CONF. REP. No. 92-1236, 92d Cong., 2d Sess. 129 (1972), 1 Leg. Hist. 321 (referring to "*national* pre-treatment standards").

[23] The expression "standards" in Section 306 is derived from the analogous provision for *new* emission source "standards of performance" under Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6. *See* EPA v. California *ex rel.* State Water Resources Control Bd., *supra* n.8, 44 U.S.L.W. at 4783-84 (noting the "strong

Congress' rationale for requiring nationwide, single-number "*standards*" for *new* but not for *existing* sources is set forth in the legislative history. Thus, as detailed by the Eighth Circuit, the "*separate* regulatory schemes for *new* and for *existing* point sources" established in the Act reflect the "contrasting policies applicable to plants to be constructed in the future and those already in place." *CPC Int'l, supra,* 515 F.2d at 1038 n.13.

It was this basic difference between "plants to be constructed in the future and those already in place" which prompted Administrator Train (then Chairman of the Council on Environmental Quality) to recommend "*across-the-board*" standards for *new* as opposed to *existing* plants:

> "*Across-the-board requirements* can be justified for *new* plants, since they have *many options* in terms of processes, inputs and the like, which is *not the case for existing facilities.*" *Hearings on H.R. 11896 Before the House Public Works Comm.,* 92d Cong., 2d Sess. 201 (1972), 2 Leg. Hist. 1115.[24]

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structural and terminological similarities between the Clean Air Act and the 1972 Water Pollution Control Act Amendments").

The national, across-the-board "*standards*" contemplated by this Clean Air Act *new* source provision likewise stand in marked contrast to the flexible *existing* source controls of Section 110, recently discussed and explicated by this Court in Train v. NRDC, 421 U.S. 60 (1975). *See also* Hancock v. Train, 44 U.S.L.W. 4767, 4774 (June 7, 1976) (accepting Congress' distinction between the regulation of new and existing sources under the Clean Air Act but holding that this distinction alone failed to provide "clear and unambiguous congressional authorization" of State permits for federal facilities under Section 110 of the Act.)

[24] Senator Muskie made much the same point in an Exhibit containing his personal views on "significant provisions of the bill,"

Illustrative of the many "options" available to *new* plants are production process changes which cannot be accomplished by plants already in place:

> "The Conference [Section 306] substitute requires establishment of a regulatory mechanism for *new sources* which anticipates not only that level of effluent reduction which can be achieved by the application of technology (including where practicable elimination of the discharge of pollutants), but also the achievement of *levels of pollution control* which are *available through the use of improved production processes,* taking into consideration the cost of achieving such effluent reduction." CONF. REP. No. 92-1236, 92d Cong., 2d Sess. 128 (1972), 1 Leg. Hist. 311.[25]

Over and above "improved production processes" which are generally available only to *new* sources, the House Committee stressed the much greater and highly variable costs of pollution reduction for plants already in place when compared with plants newly built

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presented during Senate debate on the House-Senate Conference Report:

> "[P]ollution control *alternatives* are *available* to a *new* source which are *not available* to *existing* sources.
>
> "It may be that in most instances, the *technology* for elimination of discharge of pollutants from *new* sources can be *achieved* on a considerably *more reasonable* basis *than* for *existing* sources." 1 Leg. Hist. 172.

[25] The Conference substitute follows the Senate bill and House amendment except for the deletion of Section 306(b)(1)(C), a provision which would have permitted "appropriate adjustments" from an applicable standard of performance "upon application from any owner or operator of any source." 1 Leg. Hist. 311, 2 Leg. Hist. 1626-27. The elimination of this provision again underscores that Congress intended standards of performance to apply "across-the-board" to all new sources. *See* Pet. Br. in Nos. 75-1473, 75-1705.

from scratch. Thus, the Committee's Report stresses that "across-the-board *new* source *standards* are strongly supported by:

> ". . . the significantly lower expense of attaining a given level of effluent control in a *new facility* as compared to the *future cost of retrofitting* a facility to meet stringent water pollution control measures." H.R. REP. No. 92-911, 92d Cong., 2d Sess. 110 (1972), 1 Leg. Hist. 797.

This explicit Congressional acknowledgment of the disproportionate costs and potential economic dislocation of "*retrofitting*" *existing* plants demonstrates why Congress expressly prescribed "*standards*" for *new* but not for *existing* sources. For when the "many options" available to *new* plants not yet designed and built are compared to the high and variable costs of "retrofitting" *existing* plants already in place, the rational legislative choice was to *phase in* new technology for *existing* plants by stages in 1977 and 1983 through Section 304(b) "guidelines" implemented flexibly through individual discharge permits, taking into account the widely varying age, engineering design, processes, feedstocks, climate and other factors affecting the pollution control capabilities of each specific plant.

In sum, it was no "oversight" or coincidence that Congress chose to regulate *new* and *existing* sources under different and sharply contrasting statutory provisions. On the contrary, precisely because of its understanding of the inherent differences between *new* and *existing* plants, Congress wisely chose to phase new technology into *existing* plants, *not* by across-the-board *standards,* but through the "goals" set forth in Section 301(b), "to be achieved" by flexible Section

304(b) "*guidelines*" for finalizing effluent limitations in the permit-issuing process.

II. THE LEGISLATIVE HISTORY REAFFIRMS CONGRESS' INTENTION THAT EPA ISSUE FLEXIBLE "GUIDELINES FOR EFFLUENT LIMITATIONS," IDENTIFYING A "RANGE" OF FEASIBLE DISCHARGE LEVELS AND "SPECIFYING FACTORS" FOR USE IN THE STATE/FEDERAL PERMIT PROGRAM.

As demonstrated above, the Act makes sense as a coordinated whole only if EPA is required to regulate existing sources through the issuance of "guidance" to State and EPA officials for use in the permit program. Otherwise, there would be no explanation for: (i) the "goals" established in Section 301; (ii) the "guidelines" called for in Section 304; (iii) the far different scheme of new source "standards of performance" established by Section 306; (iv) the express provision for the imposition of nationwide toxic and pretreatment standards by regulation in Sections 307(a), (b) and (c); or (v) even the Section 402 State/federal permit scheme which would be an exercise in futility if EPA were authorized to issue across-the-board, enforceable existing plant standards by regulation.

Congress' intent that EPA issue flexible guidelines for use in the permit program is reaffirmed and amplified by the legislative history. Hence, as we will show: (i) the Senate and Conference Committee Reports confirm Congress' enactment of technology guidelines identifying a "range" and "specifying factors" for use in the permit-issuing process; (ii) any other interpretation would effectively repeal Congress' "transfer of permit authority" so that the States could "do the job" without "Federal dictatorship"; and (iii) rigid, national standards defeat Congress' purpose of achiev-

ing genuine "uniformity" of treatment for disparate existing plants through flexible guidelines and EPA veto power over individual permits.

A. The Senate and Conference Committee Reports Confirm Congress' Enactment of Technology Guidelines Identifying a "Range" and "Specifying Factors" for Use in the Permit-Issuing Process.

As previously detailed, the impetus for the "guidelines for effluent limitations" eventually included in Section 304 came principally from EPA, based on the Agency's *own* prior experience with informal technology "guidelines" under the Refuse Act permit program. *See* pp. 6-13, *supra*. This EPA experience proved the impossibility of reducing "effluent specifications" to a "simple formula computation" and demonstrated that "[t]here is *no way* that anyone can sit in Washington and prepare a document that will specify effluent limitations that should be attained at numerous plants across the country." *Id.* at 8, 11, *supra*.

With this Refuse Act permit experience in mind, EPA supported legislation calling for "Federal guidance" in the form of "scientific, industrial and technical information" so that "the States, in setting effluent limitations," would have "a clear idea of the task." *Id.* at 9-10, *supra*. Consequently, it was always intended by EPA itself that effluent limitations would be set, not through regulations promulgated by EPA, but "*by means of the permits* issued under Title IV" of the Act.[26]

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[26] Administrator Ruckelshaus stressed this very point in a letter to Chairman Blatnik of the House Public Works Committee:

> "Effluent limitations required by Section 301 *would be established* and applied to all point sources . . . *by means of the permits* issued under Title IV.
>
> "We favor the approach whereby effluent limitations would be applied to dischargers through a *permit mechanism*." 1 Leg. Hist. 844. *See also CPC Int'l, supra*, 515 F.2d at 1039-40.

Against this background, Congress acknowledged the impossibility of translating available technology into single-number discharge standards for all existing plants, and accordingly accepted the need for flexible guidelines so that "specific effluent limitations for each industrial source" could be established "through the permit program." As the Senate Committee put it:

> "Unfortunately, . . . little has been done to identify for industry the exact meaning, on a *plant-by-plant basis*, of the equivalent of secondary treatment. *Through the permit program established under section 402*, with the help of those States which have effective programs, the Administrator and the States can and should . . . be able to apply *specific effluent limitations* for *each industrial source*." S. REP. No. 92-414, 92d Cong., 1st Sess. 44 (1971), 2 Leg. Hist. 1462.

Amplifying this point, the Senate Report further explained that the "guidelines for effluent limitations" provided in Section 304(b) would allow specific permit conditions to be established "for each industrial source," based on EPA's establishment of a "range" of feasible levels for the entire industry:

> "The Administrator should establish the *range* of best practicable *levels* based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." S. REP. No. 92-414, 92d Cong., 1st Sess. 50 (1971), 2 Leg. Hist. 1468.[27]

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[27] Similarly, regarding the 1983 goal set forth in Section 301, the same Report stressed the requirement that EPA establish a *"range"* of feasible discharge levels:

> "In making the determination of 'best available' the Com-

This requirement that EPA establish a "range" of feasible levels was retained by the Conference Committee in the final version of Section 304(b):

> "The Administrator should establish the *range* of 'best practicable' levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category." 1 Leg. Hist. 169.[28]

Similarly, the second requirement of Section 304(b), *i.e.*, that EPA "specify factors," was intended by Congress to provide sufficient information so that the permit-issuing authority could tailor permits to the circumstances of individual plants through selection of the appropriate discharge level from the guidelines "range." As the Senate Report explained this second requirement of Section 304(b):

> "In applying effluent limitations to any *individual* plant, the factors cited above *should be applied to that specific plant.*" S. REP. No. 92-414, 92d Cong., 1st Sess. 50 (1971), 2 Leg. Hist. 1468.

Likewise, Representative Clausen, a Manager of the Conference Report for the House, pointed to the same

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mittee expects the Administrator to apply the same principles involved in making the determination of best practicable as outlined above except that rather than the *range of levels* established in reference to the average of the best performers in an industrial category the *range* should at a minimum be referenced to the best performer in any industrial category." S. REP. No. 92-414, 92d Cong., 1st Sess. 50 (1971), 2 Leg. Hist 1468.

[28] In Senate debate over the Conference Report, Senator Muskie confirmed the necessity for a *range* of discharge levels:

> "Also, rather than establishing the range of levels in reference to the average of the best performers in an industrial category, the *range* [for 1983] should, at a minimum, be established with reference to the best performer in any industrial category." 1 Leg. Hist. 170.

requirement, explaining that "*all* those factors set forth in sections 304(b)(1)(B) . . . and such other factors as the Administrator deems appropriate *must* be considered in setting effluent limitations" in the permit-issuing process. 1 Leg. Hist. 378. Applying these factors, the specific effluent limitations for plants in the same industry would be similar "if the applicable factors . . . were the same in each plant." *Id.*

Taken together, this legislative history confirms the statutory text requiring EPA to issue "guidelines for effluent limitations" identifying a "range" of discharge levels and "specifying factors" to be used by State permit officials in the permit-issuing process. Indeed, as detailed below, any contrary interpretation affording State officials less discretion with regard to individual plant permit conditions would effectively repeal Congress' "transfer of permit authority" so that the States could "do the job" without "Federal dictatorship." *See* pp. 35-38, *infra.*

B. EPA's Rigid, Single-Number Existing Plant Standards Nullify the States' "Primary" Pollution Control "Responsibilities" and Vitiate the State/Federal Permit Program.

As previously demonstrated, Congress' first objective in the 1972 Amendments was to effect "a major change in the enforcement mechanism of the Federal water pollution control program . . . to effluent limits" by codification of the flexible technology "guidelines" approach established administratively by EPA under the Refuse Act permit program. *See* pp. 8-13, *supra.* Closely coordinated was Congress' concomitant aim of effecting an orderly transfer to the States of the permit authority previously exercised by EPA under the 1899 Refuse Act. *Id.*

In keeping with this latter aim, Section 101(b) of the Act expressed "the policy of the Congress to recognize, preserve, and protect the *primary responsibilities* and rights *of States* to prevent, reduce, and eliminate pollution." Consistent with their "primary" water pollution control "responsibilities," Congress "expected that the States will play a *major role* in the administration" of the permit program, thereby taking advantage of the considerable accumulated professional expertise of State personnel and their intimate appreciation of individual plant circumstances. S. REP. No. 92-414, 92d Cong., 1st Sess. 71 (1971), 2 Leg. Hist. 1489.

Accordingly, Section 402(a)(5) requires EPA to "authorize a State . . . to issue permits for discharges . . . within [its] jurisdiction" as soon as the State has "the capability of administering a permit program." By this provision, Congress intended an "*orderly transfer of permit authority* from the Environmental Protection Agency *to the States*" as "rapidly as they develop approved programs." 1 Leg. Hist. 363, 2 Leg. Hist. 1305.

The purpose of this "orderly transfer of permit authority" was for the States "*to do the job*" by taking "primary responsibility" for utilizing the Section 304(b) guidelines to set effluent limitations in individual discharge permits. 1 Leg. Hist. 234, 356. This purpose was succinctly summarized by Representative Blatnik, Chairman of the Public Works Committee, responsible for the House bill:

> "Unless we have *meaningful local and State participation* and *not a Federal dictatorship,* the program will founder on the rocks of the generally *inflexible*[,] Washington dictated approach.
>
> * * *
>
> H.R. 11896 provides for States and local participation, let us give them the chance *to do the job.* This bill will provide the resources and *direction* they have not had in the past." 1 Leg. Hist. 355-56.[29]

Plainly, the States' "primary responsibility" to "do the job" under the permit program is vitiated by rigid discharge standards to be "cranked mechanically" into existing source permits. Indeed, the House Committee warned against just such federal "usurpation":

> "It is *impossible* for the Federal Government *to succeed* in this program *without* the close and *active* cooperation of *the States.* A *system of permits which* requires duplicative effort or *destroys* the *initiative of the States* and local governments is wasteful and non-productive." H.R. REP. No. 92-911, 92d Cong., 2d Sess. 125 (1972), 1 Leg. Hist. 812.[30]

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[29] Representative Wright, a Conference Committee member and co-sponsor of the House bill, also stressed Congress' conviction that "State and local interest, initiative, and personnel [would] provide a *much more effective* program *than* that which would result from control in the *regional offices of the Environmental Protection Agency.*" 1 Leg. Hist. 262. *See* Sections 303(e)(2) and (3) (requiring, as a prerequisite to approval of a State permit program, State "continuing planning process," among other things, to permit development of "effluent limitations and schedules of compliance").

[30] Significantly, this Court in Train v. NRDC, 421 U.S. 60 (1975), invalidated a similar curtailment of State discretion under the Clean Air Act, which, like the Water Act, recognizes the States' "*primary responsibilities*" for controlling pollution. In *Train,* this Court stressed Congress' mandate of *flexible* State discretion to revise emission limitations:

> "We also believe that Congress, consistent with its declaration that '[e]ach State shall have the *primary responsibility* for

Accordingly, EPA's issuance of single-number discharge standards for existing petroleum refineries is not only contrary to the flexible "Federal guidance" approach consistently favored by EPA, but also fundamentally at odds with the orderly transfer of permit authority envisioned by Congress. For by reducing State permit authorities to scriveners rubberstamping discharge numbers set by edict of EPA Washington headquarters, EPA's rigid standards destroy State "initiative" and trivialize the State/federal permit program established by the Act.

C. Rigid National Standards Defeat Congress' Expressed Purpose of Achieving Genuine "Uniformity" of Treatment for Disparate Existing Plants Through Flexible "Guidelines" and EPA Veto Power over Individual Permits.

Despite EPA's consistent support for technology "guidelines" during and after passage of the Act, and Congress' concomitant aim of transferring permit authority from EPA to the States, isolated fragments in the legislative history have been cited to rationalize EPA's disregard of its explicit obligation to issue guidelines in compliance with the requirements of Section 304(b).[31] Most frequently mentioned is the follow-

assuring air quality' within its boundaries, § 107(a), *left to the States considerable latitude* in determining specifically how the standards would be met. This *discretion* includes the *continuing authority to revise choices* about the mix of emission limitations." 421 U.S. at 86-87.

In light of the Court's *Train* decision, subsequently reaffirmed in Union Electric v. EPA, 44 U.S.L.W. 5060 (June 25, 1976), amicus curiae questions the Seventh Circuit's assumption in *AMI* that single-number discharge standards are "in accord with § 101(b) of the Act" and the policy "of federalism." 526 F.2d at 452.

[31] For example, both the Third and Seventh Circuits cite a reference by Senator Bentsen to "the regulations which we an-

ing statement by Senator Muskie during consideration of the Conference Committee Report:

> "[T]he conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve *nationally uniform effluent limitations* based on 'best practicable' technology no later than July 1, 1977." 1 Leg. Hist. 162; *AMI, supra,* 526 F.2d at 451; *AFFI, supra,* 8 ERC at 1997.[32]

Certainly no one can quarrel with the general concept of "uniformity" of effluent limitations implicit in Senator Muskie's remarks.

ticipate the Administrator shall issue pursuant to section 301 and section 304 . . . ." 2 Leg. Hist. 1283; *AISI, supra,* 526 F.2d at 1040; *AMI,* supra, 526 F.2d at 451. But Senator Bentsen's comment does little more than paraphrase Sections 301(b)(1)(A) and 301(b)(2)(A), respectively, which refer to technology defined "by the Administrator pursuant to Section 304(b)(2)." In short, because of the explicit reference to Section 304(b) in Section 301, the Section 304(b) "guidelines for effluent limitations" are regulations issued, in Senator Bentsen's words, "pursuant to section 301 and section 304."

[32] The Seventh Circuit cites another obscure comment by Senator Muskie that "the factors described in Section 304(b)" may "not be considered at the time of the application of an effluent limitation to an individual point source . . . ." 1 Leg. Hist. 172; *AMI, supra,* 526 F.2d at 451.

However, Senator Muskie's comment overstates and is contradicted by the Conference Committee Report which, by its terms, deals *only* with *individual* plant consideration of "the *economic impact*" of EPA's guidelines. 1 Leg. Hist. 304; *see also* 1 Leg. Hist. 254-55. The Conference Report's discussion reflects the Committee's change from the House version, which required plant-by-plant consideration of *all* factors, to the final version of Section 304(b)(1)(B), which *retains plant-by-plant consideration of other factors* but mandates an industry-wide appraisal of the "*total cost* of application of technology in relation to the effluent reduction *benefits* to be achieved." *Compare* 1 Leg. Hist. 37-40 *with* 1 Leg. Hist. 978-87 (House version of Section 304).

The fundamental issue, however, is whether Congress intended this "uniformity" to be achieved: (i) by flexible guidelines for setting effluent limitations under the Section 402 State/federal permit program or (ii) by the imposition of regulations in the form of nationwide existing plant discharge standards. In fact, the statutory text and legislative history demonstrate that Congress chose the guidelines and permit program, *not* nationwide existing plant standards, as the means of achieving "nationally uniform effluent limitations."

Significantly, the Conference Report notes that the Section 304(b) guidelines are intended "to assure that *similar* point sources with *similar* characteristics . . . will meet *similar* effluent limitations," and that "effluent limitations applicable to individual point sources within a given category or class" are to be, *not identical,* but "as *uniform as possible.*"[33]

Moreover, Section 402(d)(2) of the Act provides that:

> "No permit shall issue . . . if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as *being outside the guidelines* and requirements of this Act."

As indicated by the Eighth Circuit, "[i]t is hard to imagine a clearer indication that the permit-issuing authority is to follow the guidelines promulgated under § 304(b), and is not to refer to independent regula-

[33] CONF. REP. No. 92-1236, 92d Cong., 2d Sess. 126 (1972), 1 Leg. Hist. 309. *See also AISI, supra,* 526 F.2d at 1044 ("uniformity was to be achieved by effluent standards within a given category which were *similar, rather than identical or unitary*") (footnote omitted).

tions promulgated under § 301." *CPC Int'l, supra,* 515 F.2d at 1038-39 (footnote omitted).[34]

The legislative history of this provision provides strong confirmation for guidelines as the means of achieving uniformity of effluent limitations established under the permit program. For as the Eighth Circuit explained:

> "The most instructive portions of the legislative history are those concerning the debate over whether the EPA Administrator should have the authority to veto state-issued permits. The debate is important not only because of what was said, but also because *the creation of the veto power would make no sense if the EPA was already empowered to promulgate regulations under § 301.*" *CPC Int'l, supra,* 515 F.2d at 1040-41.

The original Senate bill spelled out EPA's authority over the permit program in Section 402(d)(2) which provided that "[n]o permit shall issue until the Administrator is satisfied that the conditions to be imposed by the State meet the requirements of this Act." 2 Leg. Hist. 1690.

The House bill provided no EPA veto power over individual permits but rather authorized EPA to with-

[34] The Third Circuit agreed that Section 402 permits must comply "with any guidelines promulgated by the Administrator," but went on to suggest that the term "requirements" in Section 402(d)(2) may refer to "Section 301 limitations." *AISI, supra,* 526 F.2d at 1040. Even if "requirements" were to encompass "Section 301 limitations," the question would remain "*how* these limitations are to be established or *who* is expected to establish them." *Id.* at 1039 (emphasis in original). The legislative history detailed above confirms that such effluent limitations are to be established, not by regulation, but in the Section 402 permit program by State and EPA permit-issuing authorities.

draw permit-issuance authority if "a State fails to carry out its obligations and misuses the permit program." H.R. REP. No. 92-911, 92d Cong., 2d Sess. 127 (1972), 1 Leg. Hist. 814; *CPC Int'l, supra,* 515 F.2d at 1041-42.

This House action was sharply criticized by many officials who believed that "*uniformity*" among existing plants could be achieved only by "Federal review of permit applications." 1 Leg. Hist. 472-76, 707. As Governor Anderson of Minnesota put it:

> "*EPA's veto power* should further apply to help overcome political and other pressures sometimes exerted by local industry on State agencies.
>
> * * *
>
> "The *uniformity* which I cited at the outset of these remarks as the major necessity for an effective pollution control program cannot, therefore, be achieved without permitting this type of *Federal check on permits* which simply do not accomplish the job of pollution control." 1 Leg. Hist. 452-53.

More important, opponents of the House bill also argued that EPA veto power was essential precisely because "the act did *not* provide for nationally promulgated effluent *standards* for *existing* plants." *CPC Int'l, supra,* 515 F.2d at 1041. Against this background, the House nonetheless voted down a floor amendment offered by Representative Reuss designed to "give the Administrator permit-by-permit review and veto authority over all permits . . . ." 1 Leg. Hist. 580; *see also id.* at 577, 582.

Only in the Conference Committee did Congress finally amend Section 402(d) to provide the EPA

"veto power" deemed essential by Governor Anderson, Congressman Reuss and others to prevent industry "pressures" on State permit authorities which might otherwise occur because of the absence of "nationally promulgated effluent standards." CONF. REP. No. 92-1236, 92d Cong., 2d Sess. 140 (1972); 1 Leg. Hist. 323, 362, 452-53; *CPC Int'l, supra,* 515 F.2d at 1041.

Congress' grant of EPA review and veto power over individual permits directly refutes any notion of "nationally promulgated effluent standards for existing plants." *CPC Int'l, supra,* 515 F.2d at 1041. In this respect, Congress' reference to "guidelines" in the final version of Section 402(d)(2) "is critical, for that language was not used in any prior draft of the bill . . . ." *Id.* Thus, by making EPA veto power depend upon compliance with Section 304(b) guidelines, Congress underscored its intention that *guidelines,* not regulations imposing nationwide effluent limitations, were to be "the *means of achieving uniformity.*" *Id.* at 1042.[35]

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[35] This interpretation conforms with Senator Muskie's own explanation of the Conference Committee's version of Section 402(d)(2). 1 Leg. Hist. 176; *CPC Int'l, supra,* 515 F.2d at 1042. To the extent that any of Senator Muskie's other remarks may be construed as going beyond the Conference Report, they are entitled to no weight. Indeed, Senator Jackson characterized the "Exhibit" submitted by Senator Muskie during debate on the Conference Committee Report as:

> "*A back-door attempt at legislation* through . . . speeches on the floor of the Senate . . . . Fortunately, as . . . court decisions have indicated, the courts will not abide . . . *speeches reinterpreting clear legislative language.*" 1 Leg. Hist. 204.

See Commissioner v. Bilder, 369 U.S. 499, 502 (1962) (statutes must be interpreted "in light of the congressional purpose explicitly revealed in the House and Senate Committee Reports on the bill"); NLRB v. Lion Oil Co., 352 U.S. 282, 292 (1957) ("[T]he report of the Senate Committee" is "the most authori-

In short, as confirmed by this legislative history, Congress correctly believed that "some discretion," "carefully circumscribed" by expertly drafted guidelines, was essential to "preserve uniformity" of treatment for diverse existing plants in many industries. *AISI, supra,* 526 F.2d at 1044; *Grain Processing, supra,* 407 F. Supp. at 105.[36] It was precisely for this reason that Congress eschewed procrustean, single-number existing plant standards in favor of flexible guidelines which guarantee fair and equitable discharge limits for disparate existing plants, while simultaneously guarding against abuse in light of EPA's authority to veto individual discharge permits.[37]

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tative legislative gloss."); *Grain Processing, supra,* 407 F. Supp. at 103.

[36] *See also du Pont II, supra,* 8 ERC at 1722 (recognizing Congress' desire that EPA preserve uniformity by exercising "the *flexibility needed* to adjust for disparate plants in *dissimilar* circumstances"); *AISI, supra,* 526 F.2d at 1044 ("[U]niformity was to be achieved by effluent standards within a given category which were *similar, rather than identical or unitary.*").

[37] Notwithstanding the recent *AFFI* decision, this interpretation plainly would *not* "emasculate the act" by promoting competition for industry among States "by establishing minimal standards in their individual permit programs." 8 ERC at 2006. For as the Eighth Circuit correctly held in *CPC Int'l, supra, "an existing plant cannot change its forum* without becoming a new plant, in which case it would be subject to the uniform national standards for new plants promulgated under § 306." 515 F.2d at 1041 n.16. *Accord,* 1 Leg. Hist. 579-80, 379.

III. EPA'S BELATED, EXPEDIENT SWITCH TO SINGLE-NUMBER EXISTING PLANT STANDARDS CANNOT OVERCOME THE STATUTORY TEXT, LEGISLATIVE HISTORY AND EPA'S OWN ORIGINAL INTERPRETATION REQUIRING THE ISSUANCE OF FLEXIBLE GUIDELINES FOR FINALIZING EFFLUENT LIMITATIONS IN THE PERMIT-ISSUING PROCESS.

As previously demonstrated, both the text of the Act and its legislative history reveal Congress' intention that EPA issue "guidelines for effluent limitations" identifying a range of feasible discharge levels and specifying factors for finalizing individual plant permit conditions in the permit-issuing process.

EPA itself accepted this Congressional directive until late 1973 when, faced with a completely unworkable district court decision, the Agency jettisoned its previous guidelines approach in favor of single-number discharge standards which short-circuit the permit program and obliterate the discretion of State permit officials. Since that time, EPA has rarely, if ever, departed from its single-number standards and, instead, has searched unsuccessfully for a legal theory which adequately justifies its expedient about-face from the statutory guidelines.

Under these circumstances, this Court (i) should pay deference to EPA's original authoritative interpretation accepting Congress' flexible guidelines; and (ii) disapprove EPA's "effluent limitations guidelines," including the Agency's so-called "variance clause" which provides far less flexibility and discretion to permit-issuing authorities than intended by Congress. Indeed, only a decision by this Court directing EPA to implement its existing regulations as flexible guidelines will prevent a new wave of Section 509(b)(1) appeals to the courts of appeals by individual

plants suffering under EPA's current regime of single-number existing plant standards.

A. This Court Should Pay Deference to EPA's Original Authoritative Interpretation Accepting Flexible Guidelines for Finalizing Effluent Limitations in the Permit-Issuing Process.

Notwithstanding the statutory text and legislative history detailed above, some courts have nonetheless gone along with EPA's "effluent limitations guidelines" in the hope that EPA's so-called "variance clause" will somehow operate to infuse flexibility into the Agency's existing plant standards. *du Pont II, supra,* 8 ERC 1718 (4th Cir. 1976); *NRDC, supra,* 8 ERC 1988 (2d Cir. 1976); *AFFI, supra,* 8 ERC 1993 (D.C. Cir. 1976); *AMI, supra,* 526 F.2d 442 (7th Cir. 1975). Although the courts differ slightly in how EPA is to implement its regulations, their embrace of EPA's extra-statutory "effluent limitations guidelines" stems largely from deference to EPA's purported interpretation of the Act. *AISI, supra,* 526 F.2d at 1041; *AMI, supra,* 526 F.2d at 449-50, 452; *du Pont II, supra,* 8 ERC at 1721; *AFFI, supra,* 8 ERC at 2007-08.

The Seventh Circuit expressed this "hands off" approach to EPA's latest expedient interpretation as follows:

> "Our inquiry then is not whether the agency's interpretation of § 301 is the only permissible one, but rather whether it is sufficiently reasonable to preclude us from substituting our judgment for that of the agency." *AMI, supra,* 526 F.2d at 449-50 (footnote omitted).

But in light of the statutory text and legislative history previously detailed, nothing in the Act or this

Court's judicial decisions justifies obsequious deference to EPA's eleventh-hour switch to rigid existing plant standards which undercut the State/federal permit program.

On the contrary, it is EPA's *original* interpretation recommending and endorsing Congress' flexible guidelines approach which is legally significant. For this Court has stressed time and again that courts should pay "great deference," *not* to a *subsequent* agency rewrite of the statutory requirements, but to a "*contemporaneous construction* of a statute by the men charged with the responsibility of setting its machinery in motion." *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). *Accord, United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396-97 (1956); *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294, 315 (1933).

Here, EPA's "contemporaneous construction" at the time of passage was indisputably that "*specific* determinations" could "only be made on a plant-by-plant basis,"[38] and that EPA's "guidelines" would "provide information" so that "Federal and State pollution control people" could "do the job" for specific plants.[39] Only in response to unworkable deadlines ordered in *NRDC* v. *Train,* 6 ERC 1033 (D.D.C. 1973), *rev'd in part and remanded,* 510 F.2d 692 (D.C. Cir. 1975), did EPA expediently short-circuit the statutory require-

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[38] *See* p. 11 n.11, and accompanying text, *supra.*

[39] *See* p. 10 n.10, and accompanying text, *supra; see also* pp. 35-38, *supra.* Nothing better attests to the significance of EPA's shift from flexible guidelines to rigid, existing plant standards than the multitude of lawsuits in virtually every industry attacking the inflexibility of EPA's so-called "effluent limitations guidelines."

ments by short-sighted issuance of rigid existing plant standards. *See* pp. 13-14, *supra.*

Under comparable circumstances, this Court in *Train, supra,* 421 U.S. 60 (1975), actually deferred to EPA's *original* interpretation of the Clean Air Act rather than EPA's *subsequent* construction adopted in response to adverse court decisions.[40] Thus, in *Train,* EPA *originally* "concluded that § 110 (a)(3) [of the Clean Air Act] permits a State to grant individual variances from generally applicable emission standards, both *before* and *after* the attainment date, so long as the variance does not cause the plan to fail to comply" with the national ambient standards. *Id.* at 70. In response to judicial decisions adverse to this interpretation, EPA *subsequently* amended its regulations *before* review by this Court to allow variances only prior to the attainment date. *Id.* at 74.

In accepting EPA's *original* rather than *subsequent* interpretation, this Court adopted the result previously reached by the Ninth Circuit in *Natural Resources Defense Council* v. *EPA,* 507 F.2d 905 (9th Cir. 1974). *See* 421 U.S. at 72. There, the Ninth Circuit expressly declined to accord deference to EPA's *subsequent* interpretation for reasons which apply equally well in this case:

> "Under usual circumstances, we would accord 'great deference' to the interpretation of the EPA, the administrative agency responsible for enforcing the statute. *E.g.,* Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). But we feel less bound by this principle when the EPA interpretation is, as here, merely an accession to a previous judicial decision. *Indeed, the construction we adopt is more in tune with the original EPA interpretation* that has *since been abandoned* after the First Circuit's decision in Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875 (1st Cir. 1973)." 507 F.2d at 916 (footnote omitted).

[40] Accordingly, the *AMI* court's reliance on *Train* is inapposite. For the Seventh Circuit ignored the fact that the Supreme Court paid deference to EPA's *original,* not *subsequent* interpretation, and that here, as in *Train,* EPA changed its original interpretation in response to adverse judicial rulings. 526 F.2d at 450 n.16.

Similarly, this Court in *United States* v. *Leslie Salt Co.,* 350 U.S. 383 (1956), rejected the Treasury Department's "*ad hoc* contention as to how the statute should be construed," which had been belatedly adopted in response to a recent court decision, and instead followed the Department's "prior longstanding and consistent administrative interpretation." *Id.* at 396, 395.

The rationale for declining to accord deference to EPA's *subsequent* interpretation is even more compelling where, as here, the Agency's change of position derives primarily from *administrative expediency.*

For example, in *Maryland* v. *EPA,* 530 F.2d 215, 224 (4th Cir. 1975), *cert. granted,* No. 75-960, 44 U.S. L.W. 3682 (June 1, 1976), EPA urged an interpretation of the Clean Air Act which "directed Maryland and her legislature to legislate under pain of civil and criminal penalties" vehicle inspection, maintenance, retrofit and other programs for inclusion in Maryland's State implementation plan. Characterizing EPA's interpretation as an act of "*administrative expediency,*" the Fourth Circuit rejected EPA's position, notwithstanding the usual deference to the Agency:

> "We acknowledge that the construction of a statute by the agency administering it is to be accorded great weight. See, e.g., *Social Security Board v. Nierotko*, 327 U.S. 358, 368 . . . (1946). *But if the acts of the administering agency are not in accordance with law, its actions must be set aside.* 5 USC § 706." 530 F.2d at 227.[41]

In short, the *administrative expediency* which long *after* passage of the Act led EPA to switch to rigid existing plant standards cannot repeal the statutory text and legislative history previously detailed in this amicus curiae brief. Rather, by paying deference, as it did in *Train, supra,* to EPA's original, contemporaneous construction, this Court should require EPA to revert to the statutory guidelines by allowing State permit authorities to exercise discretion regarding individual discharge conditions in the permit process.

B. EPA's Otherwise Unlawful Existing Plant Standards Cannot Be Sustained Simply Because the Agency Belatedly Included a So-Called "Variance Clause" Which Provides For "Less Flexibility" Than Congress Contemplated.

Once EPA decided to abandon Congress' "guidelines for effluent limitations," the Agency apparently sensed the need at least to simulate flexibility in the permit-issuing process. Accordingly, in the final regulations for each industrial category, EPA belatedly included a so-called "variance clause" which purports to allow adjustment of the nationwide limitations "for certain plants" in each industry. *See* p. 15, *supra.*

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[41] Two additional courts of appeals have recently invalidated expedient EPA interpretations requiring the imposition of similar programs in other States. *See* Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *cert. granted,* No. 75-909, 44 U.S.L.W. 3681 (June 1, 1976); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted,* No. 75-1055, 44 U.S.L.W. 3682 (June 1, 1976).

As the courts have recognized, however, this "variance clause" by its terms provides far less latitude for consideration of the unique circumstances of individual plants than do the "guidelines for effluent limitations" which this amicus curiae brief maintains are required by the Act. Thus, the Third Circuit in *AISI* held that the

> "variance procedure provides for less flexibility than we believe Congress contemplated, since it permits deviations from otherwise rigid and unitary limitations only where the circumstances of the particular plant are 'fundamentally different' than those from which the effluent limitation was derived." 526 F.2d at 1046.

And even the Second Circuit, which accepted the "variance clause" in *NRDC, supra,* conceded that if EPA were required to identify a "range" and "specify factors" in the guidelines, "then arguably the 'variance' clause would not remedy the error." 8 ERC at 1990.

The Fourth Circuit in *du Pont II* went one step further. Although nominally upholding the "variance clause," the court ruled that "[s]ome of the specified factors are of practical applicability only to individual plants," and, accordingly, "construe[d] the congressional intent to be that the specified factors shall be applied by the permit issuer in determining whether the presumptively valid effluent limitations should apply to a particular source of discharge." 8 ERC at 1723.

Paradoxically, the *du Pont II* court hesitated to follow its own interpretation to the ineluctable conclusion that EPA's unduly restrictive "variance clause"

is unlawful and invalid. Thus, the court reserved any ruling on the mistaken theory that "the provisions of the statute and those of the regulations are of no present concern," and that "[t]he administration of these provisions in practice is a matter of speculation at the present." *Id.* at 1722.

But unless the "variance clause" is invalidated now as providing far "less flexibility" than "Congress contemplated," *AISI*, 526 F.2d at 1046, it will frustrate practical implementation of even the Fourth Circuit's more pragmatic reading and inevitably encourage a flood of individual plant appeals to the federal courts under Section 509(b)(1) of the Act.

For the truth is that EPA's "variance clause" merely simulates individual plant flexibility where none actually exists. By its terms, the clause would permit an exception only for factors "fundamentally different from the factors considered in the establishment of the guidelines." And since EPA purported to consider even site-specific factors such as plant age, size, processes and the like in development of its "effluent limitations guidelines," few, if any, circumstances exist in which an exception would be granted under EPA's clause.

In fact, as far as API is aware, *no* exceptions under the Agency's "variance clause" have been granted to any of the Nation's more than two hundred petroleum refineries. Nor is API aware of variances granted in any other industry.

As a result, the *du Pont II* court's hesitance to invalidate the "variance clause" serves only to prolong the present uncertainty at considerable cost to the federal judiciary. For if the "variance clause" were invalidated, and EPA forced to implement its "effluent limitations guidelines" as flexible guidelines along the lines intended by Congress, the many hundreds of outstanding permit disputes could be resolved by State and EPA permit officials without resort to the courts.

But so long as EPA's restrictive "variance clause" remains in force, permit-issuing authorities will be deprived of discretion to resolve the vast majority of disputed permits. And once the administrative process is concluded, individual plants denied permits tailored to their specific circumstances will be left with no choice but to appeal to the appropriate court of appeals under Section 509(b)(1) of the Act.

In short, far from saving EPA's otherwise unlawful "effluent limitations guidelines," the Agency's so-called "variance clause" constitutes a major barrier to individual plant permit flexibility deemed essential by the courts of appeals. Only by invalidating the "variance clause" as providing far "less flexibility" than Congress intended, will this Court restore the discretion afforded by Section 304(b) and prevent a multitude of individual plant appeals to the courts of appeals.

CONCLUSION

For the foregoing reasons, this Court should: (i) reverse the Fourth Circuit's decision in *du Pont II*; (ii) disapprove EPA's issuance of "effluent limitations guidelines" as rigid, single-number existing plant standards; (iii) invalidate EPA's so-called "variance clause" as providing far less flexibility than Congress intended; (iv) require EPA immediately to implement its current regulations along the lines of the flexible "guidelines for effluent limitations" mandated by Section 304(b); and (v) require EPA, as soon as practicable, to revise its regulations to provide a "range" of feasible discharge levels and to "specify factors" for tailoring effluent limitations to the circumstances of individual plants in the permit-issuing process.

Respectfully submitted,

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